No. 10-1185

In the Supreme Court of the United States

JACK W. LIGON, PETITIONER

v.

RAYMOND L. LAHOOD, SECRETARY OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Petitioner, who is a private individual authorized to issue airworthiness certifications on behalf of the Administrator of the Federal Aviation Administration (FAA), 49 U.S.C. 44702(d)(1), 44704, brought suit under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, to challenge an FAA order narrowing the scope of his delegated authority.

The question presented is whether the Federal Aviation Act, which gives the courts of appeals exclusive jurisdiction to review orders related to "to aviation duties and powers designated to be carried out by the Administrator," 49 U.S.C. 46110(a), deprived the district court in this case of jurisdiction over petitioner's age discrimination claims.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 614 F.3d 150. The order of the district court (Pet. App. 38a-39a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2010. A petition for rehearing was denied on October 14, 2010 (Pet. App. 41a). The petition for a writ of certiorari was filed on January 12, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Aviation Act grants to the Administrator of the Federal Aviation Administration (FAA) the authority to issue certificates related to air safety and navigation. 49 U.S.C. 44702(a). It also allows the Ad-

ministrator to delegate "to a qualified private person" the authority to issue such certificates or to perform the tests, examinations, and inspections necessary to their issuance. 49 U.S.C. 44702(d)(1)(A)-(B).

Pursuant to this statutory authority, the Administrator has created the Designated Engineering Representative (DER) program. See 14 C.F.R. 183.29.[1] DERs, as the designees of the Administrator, are empowered to "perform examinations, inspections, and witness tests in the * * * engineering area[]." FAA Order 8100.8C § 300 (2010).[2] The FAA has stated explicitly that DERs, "while acting pursuant to their appointment, are representatives of the Administrator for specified functions and ARE NOT considered employees of the FAA." *Id* § 300(f). Although DERs are certified by the FAA, they are independent contractors hired by the private aircraft industry to inspect private airplanes. See Pet. App. 2a. DERs are authorized to perform only the tests and inspections for which they are certified (their "authorized areas"). See FAA Order 8100.8C §§ 306, 309. The Administrator may not delegate to DERs the authority to perform any "inherently governmental functions" such as approving "departures from specific policy and guidance, new/unproven technologies, equivalent level of safety findings, special conditions, or exemptions." *Id.* § 300(c).

In most cases, DER certifications must be renewed every year. 14 C.F.R. 183.15; FAA Order 8100.8C §§ 1001(c), 1005; Pet. App. 3a. When applying for recer-

[1] The DER program is only one of many "air designee" programs. As of 2008, the Administrator relied on approximately 11,000 designees to perform a variety of functions.

[2] FAA Order 8100.8C, http://www.faa.gov/documentLibrary/media/Order/8100.8C%20CHG%201-6.pdf (May 31, 2011).

tification, a DER must "provide a brief summary of activity over the previous year," addressing "all technical disciplines in which the DER is authorized." FAA Order 8100.8C § 1005(b). The FAA determines whether to renew the DER's certification based on the "designee's performance[] and the FAA's continued need and ability to manage the appointment." *Id.* § 1000(a). In addition, the Administrator "may rescind a delegation * * * at any time for any reason the Administrator considers appropriate." 49 U.S.C. 44702(d)(2); see also 14 C.F.R. 183.15(b)(6) ("A designation made under this subpart terminates * * * [f]or any reason the Administrator considers appropriate.").

A DER applicant "may appeal a decision regarding a denied or reduced designation" to an administrative Appeal Panel. FAA Order 8100.8C § 600. The Appeal Panel must consider all available information and may interview the applicant or FAA personnel, or may invite other persons to be resources at its deliberations. *Id.* § 601. The panel may decide to "[s]upport the original decision," "[o]verride the original decision," or "[d]irect a repeat of any part of the appointment process." *Id.* § 602. Its decision represents the final decision of the agency. *Id.* § 601. An order from the Appeal Panel qualifies as a final decision of the Administrator. *Ibid.*

The Aviation Act authorizes direct review in the federal courts of appeals of all final decisions of the Administrator with respect to aviation duties and powers. 49 U.S.C. 46110(a) (providing that any "person disclosing a substantial interest in an order issued by * * * the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator * * * may apply for review of the order by filing a petition for re-

view in" the D.C. Circuit or the regional court of appeals within 60 days of the order); see 14 C.F.R. 13.235. The appellate court "has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order," and must defer to the Administrator's findings of fact, which, "if supported by substantial evidence, are conclusive." 49 U.S.C. 46110(c).

2. The Age Discrimination in Employment Act (ADEA) provides that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age * * * in executive agencies as defined in section 105 of Title 5 * * * shall be made free from any discrimination based on age." 29 U.S.C. 633a. This federal-sector provision prohibits both discrimination and retaliation based on age. See *Gomez-Perez* v. *Potter*, 553 U.S. 474, 491 (2008). The Act does not protect those who are neither employed by, nor applying for employment with, an agency of the United States.

3. a. Petitioner is a former FAA employee who first obtained a DER certification in 1983 after retiring from the FAA. Pet. App. 3a. Between 1983 and 2002 he accumulated more than 540 authorized areas of delegated authority. *Ibid.* During his annual renewal process in 2001, the FAA requested that petitioner provide information (in the format of his choosing) regarding the number of certifications he issued on behalf of the Administrator each year in each of his areas of delegated authority. *Ibid.* Petitioner "resisted this additional work, and sought new Advisors who did not require him to report his activities." *Ibid.* In 2003, petitioner finally provided a "rudimentary summary" of his activities, which revealed that he had not performed any certification activity in the area of helicopters. *Id* at 4a. In

2004, petitioner again reported no activity in the area of helicopters, and also showed no activity related to either mechanical or electrical equipment. *Ibid.* The FAA informed petitioner that it would not renew his delegated authorities in those areas if he did not show any relevant certification activity the following year. *Ibid.* Petitioner filed a complaint with the Department of Transportation's Equal Employment Opportunity (EEO) office, alleging retaliation and harassment by the FAA. See *ibid.*

The following year, petitioner again failed to demonstrate any activity related to helicopters, mechanical equipment, or electrical equipment. Pet. App. 4a. The FAA subsequently revoked 226 areas of delegated authority on the grounds of "non-use," *ibid.*, and petitioner filed a second EEO complaint. In 2008, the FAA revoked an additional 88 areas of petitioner's delegated authority for continued inactivity, and petitioner filed a third EEO complaint. *Ibid.*

b. Petitioner neither administratively appealed the FAA's decisions revoking some of his areas of delegated authority, nor filed a petition for review in the court of appeals pursuant to Section 46110 within 60 days of the agency's decisions. Instead, "approximately 90 days after learning of the FAA's decision to further reduce his areas of authority" in 2008, Pet. App. 4a, petitioner filed suit in federal district court seeking injunctive and monetary relief under the ADEA, including reinstatement of his areas of delegated authority, *id.* at 4a-5a.

The government filed a motion to dismiss petitioner's complaint on the ground that the district court lacked jurisdiction over petitioner's ADEA suit in light of the

Aviation Act's exclusive appellate review provision.[3] Gov't C.A. Br. 3. The government also filed a motion for summary judgment, arguing that petitioner could not state a claim under the ADEA because he was neither an employee of, nor an applicant for employment with, the FAA. *Id.* at 4. The district court agreed that petitioner was not an FAA employee and therefore could not make out an ADEA claim, and it resolved the case on that ground without reaching the Secretary's jurisdictional argument. Pet. App. 5a, 39a.[4]

Petitioner moved to amend the judgment, asking the district court to transfer the case to the Fifth Circuit so that he could challenge the Administrator's order under 49 U.S.C. 46110. Pet. App. 5a. The court denied that request. *Ibid.*

c. Petitioner appealed. After initial briefing was complete in the Fifth Circuit, the court of appeals entered an order asking the parties to file supplemental letter briefs addressing two questions:

1. If Plaintiff-Appellant had sought review of the actions complained of through the Federal Aviation Administration's administrative review procedures, could he have been afforded the relief he seeks in this case?

2. In light of your answer to the foregoing question, as well as 49 U.S.C. § 46110, *Zephyr Aviation, L.L.C.* v. *Dailey*, 247 F.3d 565 (5th Cir. 2001), and

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[3] As noted below at pp. 8-10, *infra*, the government withdrew reliance on this jurisdictional argument in the court of appeals.

[4] Petitioner's complaint also included a due process claim under the Fifth Amendment. The court dismissed that claim after petitioner's counsel "acknowleg[ed] that it lacked merit." Pet. App. 5a; see also *id.* at 19a (transcript of telephonic hearing).

> *Dresser* v. *Ingolia*, 307 F. App'x 834 (5th Cir. 2009) (per curiam), did the district court have subject matter jurisdiction over this case?

No. 09-10860 Supp. Briefing Order (5th Cir. Apr. 1, 2010).

In its response, the government first noted that petitioner could have obtained the relief he sought in his ADEA action if he had instead sought review through the FAA's administrative appeal process, including reinstatement of his DER authorities. 4/22/2010 Gov't Supp. C.A. Br. 2-4 (Gov't Supp. C.A. Br.). The brief acknowledged that petitioner could not obtain compensatory damages from that administrative process, but explained that the same was true of his ADEA suit because the ADEA limits a public-sector-employee plaintiff's economic recovery to lost wages. *Id.* at 2; see *Commissioner* v. *Schleier*, 515 U.S. 323, 326 (1995) (compensatory damages not available in ADEA suits against the federal government). Because petitioner earned no wages from the FAA, see Pet. App. 2a (air designees are paid by the private aviation industry), he could obtain no monetary recovery under the ADEA.[5]

As to the second question, the government argued that the court lacked subject matter jurisdiction over petitioner's ADEA claim. Gov't Supp. C.A. Br. 5-11. As it did in district court, the government asserted that petitioner's suit was an impermissible collateral attack upon an FAA order subject to review only as provided in the Aviation Act. *Id.* at 7-8. The government relied on ap-

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[5] In addition, the government noted that under the Equal Access to Justice Act (EAJA), petitioner could have obtained attorney's fees if he had succeeded in either his ADEA action or a petition under the Aviation Act. Gov't Supp. C.A. Br. 3.

pellate decisions holding that district courts lacked jurisdiction over constitutional tort actions filed pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), when such actions were "inescapably intertwined" with aviation orders reviewable under Section 46110. Gov't Supp. Br. 8-11 (citing *Merritt* v. *Shuttle, Inc.*, 187 F.3d 263 (2d Cir. 1999); *Tur* v. *FAA*, 104 F.3d 290 (9th Cir. 1997); *Green* v. *Brantley*, 981 F.2d 514 (11th Cir. 1993); *Gaunce* v. *deVincentis*, 708 F.2d 1290 (7th Cir.), cert. denied, 464 U.S. 978 (1983); *Dresser* v. *Ingolia*, 307 Fed. Appx. 834 (5th Cir. 2009)).

With permission from the court of appeals, the government subsequently filed a second supplemental brief withdrawing reliance on the jurisdictional argument in this case and in related litigation that was also pending in the Fifth Circuit.[6] 5/14/2010 Gov't 2d Supp. C.A. Br. 4-6. The government's second supplemental brief argued that this Court and the court of appeals had long established that the ADEA (like Title VII of the Civil

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[6] See *Jones* v. *United States*, 625 F.3d 827 (5th Cir. 2010). In *Jones*, the FAA had successfully argued in the district court that the court lacked jurisdiction over a Title VII claim brought by a former FAA employee seeking a DER certification for the first time. See *Jones* v. *LaHood*, 667 F. Supp. 2d 714 (N.D. Tex. 2009). The government's appellate brief in that case withdrew reliance on the jurisdictional argument but argued for affirmance on alternative grounds—namely, that petitioner could not bring a Title VII discrimination claim because he was not an "employee[]" or "applicant[] for employment" for purposes of that statute. See 42 U.S.C. 2000e-16(a). Notwithstanding the government's withdrawal of reliance on the jurisdictional argument, the court of appeals affirmed dismissal for lack of jurisdiction, citing its prior opinion in this case. See *Jones*, 625 F.3d at 830. A petition for a writ of certiorari is also pending in that case. See *Jones* v. *United States*, No. 10-1330 (filed Apr. 26, 2011)

Rights Act of 1964) "provides the exclusive judicial remedy for claims of discrimination in federal employment." *Id.* at 4 (quoting *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 835 (1976), and citing *Paterson* v. *Weinberger*, 644 F.2d 521, 524-525 (5th Cir. 1981)). The brief acknowledged that the government had "modifie[d]" its "prior view on subject matter jurisdiction," but argued that the change was a "narrow" one that did not require a remand to the district court, which had correctly granted summary judgment to the Secretary on the ground that petitioner was not an FAA employee. *Id.* at 4-5.

The government argued that its revised position was consistent with the Fifth Circuit's precedents, including the two cases cited in the supplemental briefing order. 5/14/2010 Gov't 2d Supp. C.A. Br. 5 (citing *Dresser*, *supra*, and *Zephyr Aviation*, *supra*). Those cases, the government explained, concerned whether to extend the judicially created *Bivens* remedy to situations in which potential plaintiffs already possessed a ready mechanism to seek review of FAA aviation orders. *Id.* at 5-6. The court of appeals declined to do so, given this Court's admonition that courts should not extend *Bivens* where there are "special factors counseling hesitation in the absence of affirmative action by Congress." See *id.* at 5 (quoting *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988)). As the government explained, however, the logic of those *Bivens* cases does not control when a plaintiff files suit under the ADEA, because in ADEA cases Congress has expressly authorized an exclusive cause of action to remedy the alleged discrimination. *Id.* at 4.

The government's second supplemental brief also clarified its response to the court's first question regard-

ing the relief available to petitioner. 5/14/2010 Gov't 2d Supp. C.A. Br. 2-4. It noted that a disappointed DER applicant in fact could receive more relief (rather than the same relief) from the administrative process than from an ADEA suit because the Aviation Act gives courts of appeals "*exclusive* jurisdiction to affirm, amend, modify, or set aside any part of [an] order" of the FAA Administrator relating to aviation duties and powers. *Id.* at 3 (brackets in original) (quoting 49 U.S.C. 46110(c)). As a result, a district court would be powerless to modify or reverse an FAA order that was challenged in a discrimination case; if a court found that discrimination had occurred, it could afford a plaintiff only limited relief, such ordering the FAA to consider a new DER application in a discrimination-free process. *Ibid.*[7]

d. Notwithstanding the government's agreement that the district court had jurisdiction over petitioner's ADEA claim, the court of appeals held that the district court lacked subject-matter jurisdiction over petitioner's ADEA claim. Pet. App. 5a-13a. The court reasoned that "[s]pecific grants of jurisdiction to the courts of appeals," like the Aviation Act, "override general grants of jurisdiction to the district courts," like the ADEA. *Id.* at 7a. Thus, the court of appeals concluded that the district court lacked jurisdiction to review the FAA's decision not to renew some of petitioner's areas of authority,

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[7] The government also clarified that, although attorney's fees would be available under EAJA to a successful challenger in either the district court (under the ADEA) or the court of appeals (under the Aviation Act), the conditions for obtaining those fees and the maximum fee available would differ under the terms of EAJA. 5/14/2010 Gov't 2d Supp. C.A. Br. 3-4. A prevailing party in an ADEA suit may recover under 28 U.S.C. 2412(b), whereas a prevailing party in a petition for review may recover under the slightly different terms of 28 U.S.C. 2412(d).

as well as any other claim "inescapably intertwined with a review of the procedures and merits surrounding" that FAA order. *Id.* at 8a (quoting *Zephyr Aviation*, 247 F.3d at 572).

In concluding that the district court lacked jurisdiction over petitioner's claim, the court of appeals relied on cases declining to extend the *Bivens* remedy to cases challenging FAA orders reviewable under the Aviation Act. Pet. App. 8a-11a. The court rejected the argument that those cases are distinguishable under this Court's "special factors" jurisprudence, finding that the "expansion of the *Bivens* remedy is irrelevant here, where the question is circumvention of the exclusive jurisdiction set forth by Congress." *Id.* at 15a n.4. The court did acknowledge, however, that claims against the FAA may proceed in district courts when those claims arise under constitutional or statutory provisions (such as the Federal Tort Claims Act) and seek to challenge an FAA action that is not "inescapably intertwined" with an administrative order. *Id.* at 11a-12a (collecting authorities). The court concluded that petitioner's suit is "inescapably intertwined" with a challenge to the FAA order declining to renew some of his designations of authority, and remanded with instructions that petitioner's claim that the FAA's non-renewal of his areas of authority violated the ADEA be dismissed for lack of jurisdiction. *Id.* at 12a-13a.

Separately, the court of appeals affirmed dismissal of the ADEA claims that did not challenge the non-renewal of petitioner's designated authority—specifically, petitioner's challenge to "the removal of his name from the FAA's online directory of DERs," and his allegations concerning "occasions on which he was required to perform extra work." Pet. App. 12a-14a & n.2. Like the

district court, the Fifth Circuit concluded that petitioner could not state a claim under the ADEA because he "failed to adduce sufficient evidence that he was an employee of the FAA." *Id.* at 13a-14a n.2.

Finally, the court of appeals declined petitioner's invitation to construe his appeal as a petition under the Aviation Act, or to reverse the district court's refusal to "transfer" the ADEA case to the court of appeals under 28 U.S.C. 1631. Noting that petitioner had filed his lawsuit outside of the 60-day window provided for filing a petition for review in the court of appeals under Section 46110, the court of appeals concluded that, even if his "ADEA claim could be construed as a challenge under the Federal Aviation Act," petitioner "provided no reasonable grounds for his failure to file by the 60th day." Pet. App. 15a-16a n.5.[8]

DISCUSSION

Petitioner challenges the court of appeals' holding that the Aviation Act, 49 U.S.C. 46110(a), divests the district court of jurisdiction over petitioner's claim under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* The government agrees with petitioner that the district court had jurisdiction over petitioner's claim. Review of the court of appeals' jurisdictional holding is not warranted in this case, however, both because the holding does not squarely conflict

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[8] On remand, the district court dismissed all of the ADEA claims relating to the non-renewal of petitioner's designated authority for lack of subject-matter jurisdiction. See No. 08-0441, Docket entry No. 53 (N.D. Tex. Nov. 1, 2010). Petitioner has appealed that new judgment, but has asked the Fifth Circuit to stay the briefing schedule during the pendency of this petition for a writ of certiorari. See No. 10-11297, Motion to Stay Proceedings (5th Cir. Mar. 29, 2011).

with the decision of any other court of appeals and because petitioner's claim fails on the independent ground that petitioner was not an FAA employee, as both courts below concluded, and therefore was not covered by the ADEA.

1. As the government explained in its second supplemental brief in the court of appeals, the district court had subject matter jurisdiction over petitioner's age discrimination claims. This Court has held that the analogous anti-discrimination provision of Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment," *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 835 (1976), and entitles a federal employee to de novo review of discrimination claims by a trier of fact, *Chandler* v. *Roudebush*, 425 U.S. 840, 864 (1976). The courts of appeals similarly have concluded that the ADEA provides the exclusive judicial remedy for age discrimination claims in federal courts. See *Ahlmeyer* v. *Nevada Sys. of Higher Educ.*, 555 F.3d 1051, 1057 & n.5 (9th Cir. 2009) (collecting authorities); see also *Paterson* v. *Weinberger*, 644 F.2d 521, 524 (5th Cir. 1981) (after the enactment of ADEA's federal-sector provisions in 1974, "the ADEA became the exclusive remedy for age discrimination in federal employment").

The Aviation Act provides that a person seeking review of most final FAA orders may seek review only in the federal courts of appeals. 49 U.S.C. 46110(a).[9] Such

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[9] There is no merit to petitioner's suggestion (Pet. 3, 5) that his ADEA complaint should have been deemed a petition under Section 46110 and transferred to the Fifth Circuit. Petitioner filed suit three years after the FAA's first order revoking some of his areas of delegated authority, and 90 days after the second such order. Pet. App. 4a. Section 46110(a) requires that petitions for review be filed in the court

review is not a substitute for the ADEA and does not preclude a proper ADEA plaintiff from pursuing his claims of age discrimination. When a DER applicant files a petition for review under the Aviation Act, a court of appeals reviews the administrative record concerning the certification application process. Unless an applicant raised his claim of age discrimination in his administrative appeal, such a claim cannot be adjudicated in an action under the Aviation Act seeking review in the court of appeals of the challenged agency action. See 49 U.S.C. 46110(d) (limiting appellate review to only those issues raised in the administrative proceeding). Moreover, under the plain language of the Aviation Act and long-settled principles of administrative law, appellate courts may not conduct de novo review of an order denying a DER certification. Rather, the Administrator's factual findings must be affirmed if supported by substantial evidence, 49 U.S.C. 46110(c), and the agency's ultimate determination must be upheld unless it was arbitrary or capricious.[10]

The court of appeals erred in relying (Pet. App. 8a-11a) on cases holding that courts should not provide a remedy under *Bivens* for individuals seeking to chal-

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of appeals within 60 days absent "reasonable grounds." Petitioner has offered no reasonable ground for his failure to seek review in the court of appeals or for his failure to seek review within 60 days.

[10] Although the Aviation Act is silent on the standard of review applicable to non-factual findings, the courts of appeals have applied the Administrative Procedure Act's deferential standard of review, see 5 U.S.C. 706, to such determinations. See, *e.g.*, *City of Santa Monica* v. *FAA*, 631 F.3d 550, 554 (D.C. Cir. 2011); *City of Pittsfield* v. *EPA*, 614 F.3d 7, 14 (1st Cir. 2010); *Menard* v. *FAA*, 548 F.3d 353, 357 (5th Cir. 2008); *Flamingo Express, Inc.* v. *FAA*, 536 F.3d 561, 567 (6th Cir. 2008); *Newton* v. *FAA*, 457 F.3d 1133, 1136 (10th Cir. 2006).

lenge FAA orders that are otherwise reviewable in the courts of appeals pursuant to 49 U.S.C. 46110(a). The courts in those cases adhered to this Court's admonition that *Bivens* should not be extended into a new context when there are "special factors counselling hesitation in the absence of affirmative action by Congress." *Schweiker*, 487 U.S. at 421. Here, the availability of the administrative appeal process and judicial review under the Aviation Act presents ample reason to hesitate before creating a new judicially inferred cause of action. But in contrast to *Bivens*, the ADEA and Title VII create express—and exclusive, see *Brown*, 425 U.S. at 835; *Paterson*, 644 F.2d at 524—causes of action for discrimination claims alleged by federal employees.

2. Although the court of appeals erred in concluding the district court lacked jurisdiction, this Court's intervention is not warranted in this case, both because the court's decision does not squarely conflict with the decisions of other courts of appeals and because a contrary ruling on the jurisdictional question would have no effect on the outcome of this case.

a. First, there is no division among the courts of appeals about the question presented that would warrant this Court's intervention in this case. Although petitioner does not rely on it, the Fifth Circuit identified one court of appeals decision holding that a district court had jurisdiction over an ADEA suit relating to a final FAA order that was reviewable directly in the courts of appeals pursuant to Section 46110. See Pet. App. 14a n.4. In *Cook* v. *Pan American World Airways, Inc.*, 771 F.2d 635, 642 (1985), abrogated on other grounds by *Lorance* v. *AT&T Technologies, Inc.*, 490 U.S. 900 (1989), the Second Circuit concluded that district courts had jurisdiction over airline employees'

ADEA claims challenging a seniority list that was created as part of an airline merger and approved by the FAA's Civil Aeronautics Board (CAB), even though the CAB's approval of the list also could have been appealed to the court of appeals under the Aviation Act. But to the extent the issue in *Cook* overlaps with the issue in this case, the two courts of appeals applied largely consistent reasoning. In *Cook*, the Second Circuit found that the district court had jurisdiction over the ADEA claims because the administrative agency was not authorized to decide the issues raised in the separate ADEA action. 771 F.2d at 641-642. The court therefore concluded that the ADEA claims did not constitute a "collateral attack" on the CAB's approval of the seniority list. *Id.* at 643. In this case, the court of appeals held that the district court did not have jurisdiction over petitioner's ADEA claims because they were "inescapably intertwined" with the merits of the agency's final action regarding petitioner's status as a DER. Pet. App. 12a. To the extent petitioner raised claims that "could not have been raised in a challenge to a particular order," however, the court held that the district court did have jurisdiction to consider them and affirmed the district court's grant of summary judgment. *Id.* at 13a-14a n.2. There is no conflict between the Second and Fifth Circuits that would warrant this Court's review.[11]

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[11] Although petitioner relies (Pet. 6-7) on the district court's decision in *Breen* v. *Peters*, 474 F. Supp. 2d 1 (D.D.C. 2007), the reasoning of that decision is also consistent with the reasoning of the court below. The district court in *Breen*, like the court below, stated that "[c]ertain FAA administrative orders are reviewable only by the court of appeals," and that "claims that are '"inescapably intertwined" with review of such orders' do not fall within a district court's jurisdiction." *Id.* at 4 (citations omitted). The district court concluded that the ADEA claim

Moreover, the question whether district courts have jurisdiction over employment discrimination claims brought by FAA designees is unlikely to arise with any significant frequency. As discussed at pp. 18-19, *infra*, most such suits are subject to dismissal for failure to state a claim because designees are neither "employees" of nor "applicants for employment" with the FAA.[12] It is not clear in any event why an FAA designee would pursue such a claim under the ADEA or Title VII, since the only remedies available to him are equally available under the Aviation Act. The Aviation Act gives the courts of appeals "exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order" challenged. 49 U.S.C. 46110(c). A district court therefore cannot order the FAA to grant a disappointed applicant the primary relief he is likely to seek—DER authority. See Pet. App. 12a ("[T]he relief [petitioner] seeks—reinstatement of his areas of authority—cannot be granted by a district court reviewing an ADEA claim."). Nor could a court award a DER applicant backpay, because air designees are either independent contractors or full-time private employees, and in either instance are paid directly by a private-sector entity. *Id.* at 2a. The only types of relief a DER applicant could obtain in an ADEA suit would be a finding of discrimination; an order requiring the FAA to consider a new DER applica-

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of the FAA employee in that case was not inescapably intertwined with the FAA's decision to outsource certain flight service activities to private entities in part because the employee did not have an opportunity to raise an age discrimination claim in his administrative appeal. *Id.* at 6.

[12] In some cases, an applicant who is a former FAA employee may be able to state a post-employment retaliation claim under the ADEA or Title VII. See, *e.g.*, *Robinson* v. *Shell Oil Co.*, 519 U.S. 337 (1997).

tion in a discrimination-free process; and, possibly, attorney's fees under EAJA.

b. This case would not be a suitable candidate for review in any event, since petitioner's ADEA claim fails on an independent ground: as both courts below concluded, petitioner was a DER, not an employee of the FAA, and therefore was not covered by the ADEA. Pet. App. 13a-14a n.2 (court of appeals); *id.* at 36a, 39a (district court).

DERs are skilled independent contractors who, "while acting pursuant to their appointment, are representatives of the Administrator for specified functions and ARE NOT considered employees of the FAA." FAA Order 8100.8C § 300(f). DERs are not permitted to perform certain "inherently governmental functions" that "cannot be delegated to a designee." *Id.* § 300(c). Moreover, the FAA does not set DERs' work schedules, does not actively supervise the work performed by DERs, and does not provide them with any equipment or office space. See Pet. App. 27a-28a; Gov't C.A. Br. 10-11. Designees collect no salary or benefits from the FAA. Gov't C.A. Br. 10. Instead, they are paid by private aviation companies. Pet. App. 2a. In fact, some DERs are full-time employees of private companies. FAA Order 8100.8C § 307 (discussing "Company DER" certification). And if a current FAA employee wishes to become a designee, he must resign from the FAA before obtaining DER certification. *Id.* § 402.

The district court in this case correctly concluded that, although it had subject matter jurisdiction over petitioner's ADEA claims, the government was entitled to summary judgment because petitioner had failed to establish that he was an employee of the FAA. Pet. App. 39a. Although the court of appeals concluded that

the district court lacked jurisdiction over certain claims, it concluded that the district court properly exercised jurisdiction over other claims, but that those claims failed because petitioner "failed to adduce sufficient evidence that he was an employee of the FAA." *Id.* at 13a n.2. Petitioner does not seek review of that holding. Because petitioner is not an employee entitled to adjudication of his ADEA claims, this Court's review of the court of appeals' jurisdictional holding is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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